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MENS REA AND THE LAW WITHOUT IT

RATIONALE AND THE WEST VIRGINIA RULE*

GERHARD O. W. MUELLER**

MENS REA means evil mind.¹ It is, therefore, a psycho-ethical concept.² The law has employed it as a legal concept, signifying that frame of mind which accompanies, and sometimes, in addition, precedes, the evil act, *actus reus*. The combination of the two provides for criminality under law,³ and has been embodied in the negatively phrased maxim: *actus non facit reum nisi mens sit rea*.⁴

"There can be no crime, large or small, without an evil mind. In other words, punishment is the sequence of wickedness. Neither in philosophical speculation, nor in religious or moral sentiment, would any people in any age allow that a man should be deemed guilty unless his mind was so. It is therefore a principle of our legal system, as probably it is of every other, that the essence of an offense is the wrongful intent, without which it cannot exist."⁵

Since time immemorial *mens rea* has been a condition of criminality, though not always under that name. Most earlier researchers believed that originally all criminal liability was absolute, *i.e.*, that *mens rea* was an unknown, and that penal liability was imposed for the harmful act, regardless of the wrongdoer's frame of mind. Elsewhere I hope to have shown that such views are erroneous.⁶ It is conceded that primitive law judges typical and schematic views. But it is improper to conclude that *mens rea* was of no concern.⁷ Primitive law did and does even distinguish between forms of *mens rea*, usually intention and negligence. Monks and scholars trained in Roman and Canon law imported

* The introductory part of this essay is based on a thesis written in partial fulfillment of the requirements for the degree of LL.M. at the School of Law, Columbia University. For valuable criticism I am deeply indebted to Mr. Herbert Wechsler, Professor of Law at Columbia University.

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¹ Lit. mind evil.

² Frequently it has been said that *mens rea* means blameworthiness. While not a literal translation, this is a helpful characterization of the concept in terms of the purpose which it serves or ought to serve.

³ Under law—*nullum crimen sine lege*.

⁴ An act is not made evil—criminal—unless the mind is evil—criminal, which has been called "one of 'Coke's scraps of Latin'." See note, *The Doctrine of Mens Rea*, 13 CRIM. L. MAG. 831 (1891).

⁵ I BISHOP, CRIMINAL LAW 192-193 (9th ed., Zane & Zollman 1923).

⁶ MUELLER, *Crime, Tort and the Primitive*, 46 J. CRIM. L., C. & P.S. 303 (1955).

⁷ See also 4 BINDING, DIE NORMEN UND IHRE UEBERTRETUNG 12-13 (1919).

the Roman form of *mens rea*, namely *dolus* and *culpa*, or intent and negligence, to England. The familiarity with these concepts made the English *mens rea* more rigid; it did not, however, found it.⁸

While negligence usually is flavored with an ingredient of ethical disapproval,⁹ intention is an ethically indifferent concept. It acquires a value only when used in context. The law uses it in only one context, as a form of *mens rea*. *Mens rea*, by the very ingredient, *rea*, however, is quite decidedly a term with an ethical value, for evil and good are terms of ethics, not of law. The law, of course, can declare certain acts prohibited and leave others permissible. An ethical law, moreover, will not prohibit acts that are ethical. Such was precisely the position of the common law at one time. The sphere of the ethical acts coincided with the sphere of the lawful acts, the sphere of the unethical acts coincided with the sphere of prohibited acts, of which crimes were the gravest.¹⁰ A criminal act, thus, was an evil act, *actus reus*. Consequently, the frame of mind accompanying the evil act was an evil mind, *mens rea*.

Thus did *mens rea* acquire its ethical flavor with which the twentieth century knows little what to do, for all that is being remembered today is the fact that *mens rea* is the intent to do that which in fact amounts to a crime, or the doing so by negligence. It has been forgotten that no longer do the spheres of evil acts and of prohibited acts coincide. The sphere of crime is no longer that body of disapproved conduct which is a cultural heritage of a people and known to every sane adult to be so. Law and ethics no longer grow together at the same pace. The law stepped faster, too fast to be absorbed into the body of the rules of ethics, of culture. Thousands of regulatory offenses in all areas of commercial, industrial and social endeavor have been created, which no mortal can possibly all know by heart, nor be aware of at all times.¹¹ While, thus, in medieval days the doing of an act which amounted to a breach of public law, with the intent to do so, could be considered virtually conclusive evidence of an evil mind, unless it

⁸ False: Sayre, *The Present Signification of Mens Rea in Criminal Law*, HARVARD LEGAL ESSAYS 399, 401 (1934).

⁹ The disregard, or lack of interest, for the interests of the community, or of others.

¹⁰ Breaches of promise, torts, crimes. "Criminal liability imports a condemnation, the gravest we permit ourselves to make." Wechsler, *A Thoughtful Code of Substantive Law*, 45 J. CRIM. L., C. & P.S., 524, 528 (1955).

¹¹ The constitutional aspects of the creation of crimes out of formerly indifferent acts, as well as the justness of such laws, have been aptly discussed in a *mens rea* conscious article by Laylin and Tuttle, *Due Process and Punishment*, 20 MICH. L. REV. 614 (1922).

could be established that the offender had no mind at all, *i.e.*, was insane, or that the act was accidental, this is no longer the case today. The doing of an act which happens to be contrary to a regulatory statute, while indicating an intent, or perhaps (non-legal) negligence, does not tell us anything about the defendant's *mens rea*. To be quite sure, if it were established that the defendant knew of the regulatory statute, and committed the act nevertheless with awareness of all material facts, his mind would be evil. But he may very well not have known of the statute, nor have had an opportunity to know it or to know about it. If so, his act was not accompanied by an evil mind, for it is a fiction and an utter farce to say under today's circumstances that everybody is irrebutably presumed to know the law. But by presuming that the defendant did know the law, it is now reasoned that despite such knowledge of the law he breached it, evidencing thereby an evil intent to do so. He had *mens rea*.¹² Fiction aside, the fact is that we do not know whether the defendant had an evil mind, nor do we know whether he knew that his act was contrary to statute, nor, under such laws, are we supposed to care about that at all, since *error juris nocet*.¹³ Hence, today we take the risk that a defendant may be convicted although he did not have *mens rea*. All we know is that he had *mens*, namely the ethically indifferent intent to do that which happened to amount to a breach of the law. His forefathers were guided by what they knew to be *evil*; he has no longer such a guidance.¹⁴ Thus, in a large sphere of criminality, *actus reus* has lost its *reus*, *mens rea* has lost its *rea*. The only thing that has remained constant is the phrase that *mens rea* is the intending to do that which is forbidden by law, or the doing so by negligence. The law has grown fast, ethics have grown barely. Hence the discrepancy.

Let us remind ourselves that when we talk of *mens rea* in connection with crimes or violations which do not have a counterpart in the culture of the people, we really mean only *mens*, and that imposition of liability for such offences without *mens rea* is likely to be conviction for acts that in fact were not accompanied by an evil mind. But the imposition of criminal liability without estab-

¹² Many statutes took an even easier path, by simply declaring that for the purpose of this statute no *mens rea whatsoever* is required. *Infra*, n. 44.

¹³ Error of law does not excuse; also in the form *ignorantia legis neminem excusat*, ignorance of the law excuses nobody.

¹⁴ It is rather doubtful that the prescriptions and proscriptions of all the regulatory statutes and ordinances will ever become part of the cultural heritage and common knowledge, as are "true" crimes, unless they are sung on the weekly hit parades and published in the form of comic books.

lishing an evil mind is strict liability, *i.e.*, strict liability which did not exist prior to the influx of regulatory legislation.

It follows then that in the area of regulatory offenses the application of the maxim *error juris nocet* works, or may work, considerable hardship, inconsistent with another salient principle of our criminal law: that it is better for ninety-nine guilty men to be acquitted than that one innocent man be punished.¹⁵ The existence of a statute regulating conduct which, absent such statute, would be perfectly permissible and lawful is in itself a fact. You and I and every sane citizen know that it is criminal to steal and to murder. But who knows that if he permits Canadian thistles to grow to maturity in his backyard he commits an offense against the government?¹⁶

It may be argued that adherence to the maxim *error juris nocet* does not really work many hardships, because most of the regulatory offenses are of a local nature, aimed at local evils. Thus, the local residents would be familiar with both the evil and the statute or ordinance. Other regulatory offenses, it can be said, apply only to certain occupations, industries, or activities, ranging anywhere from trout fishing and dog walking to mixing highly explosive chemicals.¹⁷ Persons thus employed would be simply reckless not to keep informed about all laws and regulations governing their activities. If they fail to do so punishment will hit them justly, and will serve as a warning to use greater care—or not to be forgetful—in keeping posted on the law in the future. There is much truth in these arguments. Nevertheless, none of them attempts to refute the fact that unjust convictions for violations are indeed possible and, in fact, occur often. Not even greatest care can always assure knowledge of the innumerable regulatory statutes which govern our daily life. Rather than to frustrate the community at large by ignoring the citizen's good faith and holding him guilty of a breach of the law based on intolerable fiction, the defendant should be permitted to establish his non-negligent ignorance of, or mistake about, a regulatory law, as an absolute defense. Only such a rule will secure just convictions and thereby exercise a deterrent effect.¹⁸

¹⁵ But we would be poor administrators indeed if we could not do better than to bring one of 100 truly guilty men to justice.

¹⁶ *Story v. People*, 79 Ill. App. 562 (1898) was a prosecution for violation of a Canadian thistle statute. The issue was, however, mistake of fact, rather than mistake of law.

¹⁷ Thus, in *Story v. People*, *supra* n. 16, the offense was of both local and occupational importance for the defendant, and he was aware of the statute.

¹⁸ For an excellent discussion see HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* c. 11, esp. 372-376 (1947).

Far from recognizing that in the area of regulatory penal law the existence of a law is a question of fact, ignorance of which should be excused, as is and was the rule at common law, a more active sin has been added to this passive one. For an example let us return to the imaginary gentleman with Canadian thistles in his backyard. Suppose he knows about the Canadian Thistle Law. Eagerly he tears out all thistles which a reputable biologist of the Hometown University had pointed out to him as Canadian thistles (*Carduus arvensis*). Unfortunately, the biologist had committed an honest mistake, thus permitting our gentleman backyard-farmer to become an unwilling law breaker, since his Canadian thistles flourished to maturity. Will the law excuse him on account of his bona fide reliance on an expert's honest mistake, and the bona fide effort to use all care for complying with the law? No,¹⁹ chances are that the court will not even permit him to introduce his defense. The rule has developed that in all regulatory penal law mistake of fact is no defense.²⁰ Thus, the ancient and sacrosanct maxim of the common law *actus non facit reum nisi mens sit rea* has been abrogated in a major part of our penal law today.²¹

The reasons for such an anomaly have been variously stated: If *mens rea* were required, (1) the enforcement of the statute would be impeded; or (2) the courts would be overburdened; or (3) justice would be hampered; or (4) fraudulent defenses could be fabricated, etc. Prima facie such claims can be just as easily made as refuted. The often stated reason here listed under (1), for instance, seems to be nothing more than a woman's "because", and proves no more.

(2), *supra*, is a little more specific. It is certainly true that there is hardly any aspect of human activity which has escaped control by the law. When we eat, the (pure food and drug) law eats with us; when we walk, the (traffic) law walks with us; and

¹⁹ Accord: *Laird v. Dobell*, [1906] 1 K.B. 131.

²⁰ This maxim, considered by some as the conversion of the principle of *mens rea*, is one of the finest examples demonstrating the ethical origin of the *mens rea* concept. The mind was considered not to have been evil if the perpetrator acted under such a mistaken belief of the factual circumstances that, if all had been as he imagined, he would have acted lawfully.

²¹ It may be true, as Chief Justice Vinson stated in *Dennis v. United States*, 341 U. S. 494, 500 (1951), that "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." (Incidentally, the civil law makes considerably less use of absolute criminal liability.) But the petty offenses which constitute the exceptions surpass numerically by far the prosecutions for crimes that still are subject to common law *mens rea*. In fact, it is all but conceded that the liability for violations of city ordinances—a huge bulk of penal legislation—is an absolute one as a rule. See 9 McQUILLAN, MUNICIPAL CORPORATIONS 675-682. (3d ed., Smith et al. 1950).

even the health and soundness of our sleep is regulated by law.²² To litigate every one of the regulated problems of daily life would surely hamper the administration of justice.²³ But what good will it do to punish indiscriminately, regardless of guilt or innocence, merely to save the time it would take to determine the validity of a defense? And what of the deterrent effect of such a frustrating law? Would it not ease the burden on the court and reduce the length of the court calendar much more if, for instance, in January we would prosecute only blond culprits, in February only bald ones, in March brunettes, etc? That would at least deter some of the culprits some of the time, whereas absolute criminal liability is totally without deterrent effect. But more of that later.

Ad (3) it might be answered that absolute criminal liability surely is not the vehicle to unhamper criminal justice. If anything, it does away with justice altogether by distributing penalties indiscriminately. *Ad* (4) it will suffice to ask: what crime is there which is not subject to the interposition of fraudulent defenses? Surely the temptation for tricking one's way out of a jam is much greater in crimes threatening serious consequences than it is in petty offenses.

Our legal literature lacks any thorough inquiry into the veracity of such claims. Only a major inquiry, delving deeply into the problem can ultimately lead us to the sound law. This paper will do no more than to sketch the development and rationale, or rather irrationale, of absolute criminal liability. It will discuss mainly West Virginia law, and will use West Virginia cases and statutes as examples.

It is regrettable that, absent a major inquiry and enlightenment, the law muddles along unintelligently. While the unsoundness of absolute criminal liability has been recognized by leading American scholars,²⁴ there is only little encouraging official action. At its recent meeting the American Law Institute approved section 2.05 of the *Model Penal Code* which sanctions absolute liability for

²² E.g., D.C. CODE tit. 6, c. 6.

²³ A list of the categories of statutes not requiring *mens rea*, as just explained, may be found at Sayre, *Public Welfare Offenses*, 33 COL. L. REV. 55, 77, 78 (1933), reprinted at MICHAEL AND WECHSLER, *CRIMINAL LAW AND ITS ADMINISTRATION* 783 (1940); and see A.L.I., *MODEL PENAL CODE* (Tent. Draft. No. 4, 141-145, 1955).

²⁴ E.g., Wechsler, *A Thoughtful Code of Substantive Law*, 45 J. CRIM. L., C. & P.S. 524, 527-528 (1955); *id.*, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367, 374 (1955); *id.* *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, *passim* (1952); HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* c. 10 (1947).

violations, banning it only from misdemeanors and felonies.²⁵ I suppose we have to be grateful for the action of the Institute, as the new section would at least prevent imprisonment for innocent wrongdoers, fines being the only penal consequence for violations. The comments to section 2.05 are full of good intentions and noble purposes, and should be readily approved. But they fall short of explaining why absolute criminal liability should be retained at all, even in its minimal form.²⁶ Before going on with the discussion of absolute criminal liability in the regulatory field, the law of violations, a few more words will have to be said about *mens rea* itself, and about the common law position on *mens rea*.

It has been contended that there is no singular concept of *mens rea*, but that every crime requires a different *mens rea*, that today *mens rea* is a plural concept and, unless used in connection with a specific crime, ought to be considered as *mentes reae*.²⁷ Mr. Sayre, who coined the term "*mentes reae*",²⁸ had become conscious of the fact that a number of crimes require more, by way of a subjective element, than the mere intent to do that which amounts to a commensurate, and criminal, act. For instance, murder may require "malice aforethought", a special addition to the mere intent to kill. Thus, while ordinarily *mens rea* and act are commensurate—in the case of intent—, in the case of murder *mens rea* may be out of proportion to the act of killing. There are a number of similar instances both at common law and at civil law. For the purpose of selecting the most effective deterrents, the law has here deemed it wise to attach a higher amount of liability to an act if committed with an especially evil motive or design. Do such modifications substantially alter the basic concept of *mens rea*, or that part of *mens rea* which all crimes have in common? If one remembers that *mens rea* means evil mind, it is clear that Mr. Sayre confused the form of the concept with its substance. Just as negligence is a lower form of *mens rea* than (commensurate) intent, so malice aforethought is a higher form than (commensurate) intent. Similarly, carelessness, or heedlessness, the attitude of nonchalance in the light of duty, is a lower form of *mens rea* than negligence. Whatever the merit or demerit of all these various forms of *mens rea*, which has been a matter of considerable debate, we can say

²⁵ A.L.I., MODEL PENAL CODE (Tent. Draft No. 4, 18-19, 1955).

²⁶ *Id.* at 140.

²⁷ Sayre, *The Present Signification of Mens Rea in Criminal Law*, HARVARD LEGAL ESSAYS 399, 402-403.

²⁸ Stephen, J., fathered the thought in *Regina v. Tolson*, [1889] 23 Q.B. 168, *passim*, gen. see HALL, GENERAL PRINCIPLES OF CRIMINAL LAW c. 5 (1947).

that they have acquired a right to existence in the criminal law by prescription.²⁹ *Mens rea*, thus, is a singular concept, an element of criminality, which may appear in any one of several possible forms. The imposition of criminal liability does not follow every finding of an act and a *mens rea*, or rather seeming *mens rea*, for not every form of *mens rea* also has its substance. The law has defined the occasions of "*mens rea* form without substance" in a rigid system: "*Mens rea* does not lie, i.e., has form but no substance, if the actor had a ground of justification for his act, or acted by order of the law. Thus, in murder we prohibit the killing of a human being with the intent to kill, but admit exceptions to the rule, according to societal utility, such as the killing at war time, the killing in self-defense, the official execution, etc. As the law does not deem these instance of killing evil, the defendant who kills under such circumstances with intent to kill, though he acted with a form of *mens rea*, intent, has not had the substance of *mens rea*, an evil mind."³⁰

It has sometimes been thought feasible to incorporate these grounds of justification, as well as the defenses of insanity, infancy etc., into the *mens rea* concept.³¹ Such attempts have proved abortive for the simple reason that grounds of justification exclude all "*rea*"—leaving the "*mens*" a legally insignificant shell—and that the exculpatory grounds exclude not only all "*rea*" but also all "*mens*."³²

So much by way of an explanation of *mens rea*. I shall next have to mention those instances of the Anglo-American penal law, other than regulatory violations, which are inconsistent with the meaning of *mens rea*, which disregard it, in part or *in toto*, thereby imposing partial or total strict liability.

It has been said frequently that the non-statutory common law itself knows a number of exceptions to its avowed reliance on *mens*

²⁹ Incidentally, it seems to be commonly recognized that carelessness is the lowest form of *mens rea*. Nothing short of carelessness has ever been utilized as *mens rea* for any statutory crime. The non-statutory common law did not consider carelessness or heedlessness as *mens rea* at all.

³⁰ A thorough analysis of the various theories may be found at Michael and Wechsler, *A Rationale of the Law of Homicide*, 37 COL. L. REV. 701, and 1261 (1937).

³¹ Sayre, *The Present Signification of Mens Rea in Criminal Law*, HARVARD LEGAL ESSAYS 399, 403 (1934).

³² Anglo-American law has not recognized insanity and infancy as mitigating grounds when they are found to lower, rather than to exclude, the capacity to form a legally significant *mens rea*. This may be unfortunate, but until such a step is taken—which will probably be a good number of years after medical science has convinced us of its necessity—these defenses cannot be said to affect, or go into, the *mens rea* concept at all; they simply exclude it altogether.

rea. These are said to lie in the areas of criminal libel,³³ criminal nuisance,³⁴ and "domestic misdemeanors."³⁵ Such claims are usually restricted to the liability of a person in the nature of a principal for the unlawful acts and *mens rea* of a person in the nature of his agent. Strictly speaking, these examples would constitute more than criminality without *mens rea*. Not only does the person against whom the law moves lack any *mens rea*, but he has not even committed the proscribed act himself. This form of liability is in the nature of vicarious liability, a form of liability otherwise known only in tort law. Investigation has shown, moreover, that there is little support for the belief in such instances, be they of direct or vicarious absolute liability, as at common law,³⁶ some isolated cases notwithstanding.

More important is the exception to the common law *mens rea* requirement which has been created in the form of "result-qualification." Instances are the felony-murder rule and the misdemeanor-manslaughter rule. Here the law imposes upon the perpetrator of a felony, or a misdemeanor, as the case may be, the liability (and punishment) for such an offence plus an additional liability (and punishment) for the death of a human being that occurred as an incident to the basic crime.³⁷ It is noteworthy that the law will not impose a liability on the actor unless he evidenced at least some blameworthiness. He had "a" *mens rea*.

³³ BISHOP, CRIMINAL LAW §§ 219.2-221, 922-923 (9th ed., Zane & Zollman 1923); WHARTON, CRIMINAL LAW §§ 1964, 1990 (12th ed., Ruppenthal 1932); BURDICK, LAW OF CRIME § 802 (1946); RUSSELL, CRIME c. 49 (10th ed., Turner 1950); CLARKE & MARSHALL, CRIMES § 188 (e) (5th ed., Kearney 1952); SEARS AND WEIHOFEN, MAY'S CRIMINAL LAW § 38 (1938); MILLER, CRIMINAL LAW § 80 (b) 1934); WILLIAMS, CRIMINAL LAW § 77.1 (1953); TURNER, KENNY'S OUTLINES OF CRIMINAL LAW § 28 (1952); CROSS AND JONES, INTRODUCTION TO CRIMINAL LAW art. 14 (3d ed. 1953).

³⁴ BISHOP, *op. cit.* § 1075; WHARTON, *op. cit.* §§ 1688, 1690, and § 287; BURDICK, *op. cit.* §§ 887-891; RUSSELL, *op. cit.* at 1674 *et seq.*; CLARK AND MARSHALL, *op. cit.* § 188 (f); SEARS AND WEIHOFEN, *op. cit.* at 3, 44, 160; MILLER, *op. cit.* at 248, 421; WILLIAMS, *op. cit.* § 77.2; TURNER, *op. cit.* §§ 28, 447; CROSS AND JONES, *op. cit.* at 49, 68; BATY, VICARIOUS LIABILITY c. 10 (1916); Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 688, 708-709 (1930).

³⁵ SEARS AND WEIHOFEN, *op. cit.* § 39; Perkins, *The Doctrine of Coercion*, 19 IOWA L. REV. 507, 513-514 (1934); Notes, 31 YALE L.J. 337 (1922), 20 MICH. L. REV. 547 (1922); Annot. 6 Am. Dec. 106, 33 Am. St. Rep. 88, 4 A.L.R. 266, 19 A.L.R. 136, 71 A.L.R. 1111.

³⁶ Will be discussed elsewhere.

³⁷ In West Virginia, as in a number of other states, the application of the felony-murder (1st degree) rule has been wisely restricted to a few selected crimes of particularly atrocious nature, *i.e.*, arson, rape, robbery, and burglary, or the attempt to commit any of these. W. VA. CODE c. 61, art. 2, § 1 (Michie 1949), applied in the controversial rape case *State v. Beale*, 104 W. Va. 617, 631, 141 S.E. 41 (1927). Likewise, the fatal result of an abortion will subject the offender to liability for murder. W. VA. CODE c. 61, art. 2, § 8 (Michie 1949). *State v. Lewis*, 133 W. Va. 584, 601-602, 47 S.E.2d 513 (1949).

However, his *mens rea*, namely in the form of an intent (to commit the basic felony or misdemeanor) covered only the basic crime. What, then, was his *mens rea* for the death incidental to the basic crime? The defendant did not want such a death to occur, he may not even have been negligent or careless in causing it. But the law does not care about the measure of care and precaution which the perpetrator has taken to avoid the occurrence of a death. The law will impose liability for the death upon the perpetrator of the basic crime as long as in fact the death would not have occurred (as early as it did) had it not been for the intervention of the perpetrator's felony or misdemeanor, however unpredictable the chance of death was. Does the law carry the perpetrator's *mens rea* of the crime over so as to cover the incidental death? This would be pure fiction. But whether we say we do not care, or whether we create a fiction, the result is the same: the death need not be covered by any form of *mens rea*, nor need it be causally connected with the basic crime within the realm of human foreseeability.³⁸ Such, then, is an incident of at least partial criminal liability without fault.³⁹

Next, there are a few late common law crimes—statutory creations, but usually and properly considered as “common law”—which dispense with the *mens rea* requirement as to certain singled-out elements. It is said that with respect to these elements the actor acts at his risk, and that the law will impose liability upon him despite his blamelessness if in fact the condition was such as the law requires for criminality. But with respect to other elements of the crime, error of fact will excuse. For instance, the crime of abduction has been held complete if in fact the girl abducted was below the statutory age, no matter how careful the defendant has been in his inquiries about the age of the girl.⁴⁰ Similar instances can be found in a number of crimes. A particularly grave incident is said to lie in the law of libel in some jurisdictions, namely, with respect to the belief in the truth and lack of harmful tendency of the matter published.

³⁸ See Crum, *Causal Relations and the Felony Murder Rule*, (1952) WASH. U.L.Q. 191.

³⁹ Namely with respect to the qualification, not with respect to the basic crime. The increased punishment for the qualification cannot be viewed as merely a matter of legislative pleasure on the distribution of punishment: if act X plus *mens rea* X create a liability subject to punishment N, and act X plus *mens rea* X plus result Y create a liability subject to punishment N plus 1, then punishment 1 is based on liability without *mens rea*.

⁴⁰ Regina v. Prince, [1875] 13 Cox. C.C. 138, 2 C.C.R. 154.

But by far the most important disregard of the *mens rea* requirement exists in the sphere of regulatory penal law, which I shall now discuss.

For a detailed historical introduction I must refer the reader to Professor Sayre's various articles on the topic, frequently cited in this essay. Suffice it here to say that regulatory penal law is a newcomer in our system.⁴¹ It was born with the industrial revolution, and developed side by side with the growing concern for public welfare which was the concomitant of industrial progress. It had independent beginnings in England and in this country. The best evidence for the close relation between the industrial revolution and the regulatory penal law is the fact that in this country the earliest statutes and cases came from the New England states, particularly Massachusetts, where the industrial revolution took its start. The first statutes concerned the welfare of minors, the regulation of tobacco, intoxicating liquor, gaming, and the protection of the public against adulterated food, as well as the protection of the purity of morals.

Public sentiment and political opinion had swung from the primary protection of the individual to the primary protection of society, at the expense of individual freedom.

The courts' opinions reflect not only the changing social attitudes, but also the philosophico-legal currents. At the height of naturalism, in 1789, Lord Kenyon, C.J., exclaimed: "It is a principle of natural justice, and of our law, that *actus non facit reum nisi mens sit rea*."⁴² Let us change 1789 to 1879, and see what the opinion is: "... the dictates of natural justice, such as that a guilty mind is an essential element of crime, cannot be the ground of decision" And the court which so spoke then weighed the problem before it between "the injustice of punishing unconscious violations of law, and . . . the necessity, in view of public utility, of punishing, at times, some of that very class of offenses," and it chose the latter.⁴³

A misunderstood 19th century utilitarianism had replaced the 18th century naturalism. Courts became obsessed by the idea that the rapid breakdown of morals—or so they thought—could not be halted except by being severe with offenders, for the ultimate gain of society. Severity was thought to be identical with deterrence. But what avenue had they chosen? Absolute criminal liability!

⁴¹ A brief historical account is also given in *Magnolia Pipe Line Co. v. State*, 243 P.2d 369 (Okla. Crim. 1952).

⁴² *Fowler v. Padget*, 7 T.R. 509 (1798).

⁴³ *Halstead v. State*, 41 N.J.L. 552, 592, 32 Am. Rep. 247 (1879).

The only form of sanction which is totally ineffective as a deterrent, as will be more clearly shown below.

There were, and are, two distinct modes of making an offense one of absolute liability. One way is to dispense with the requirement of an intent, so it is said. What really is meant is that the requirement of an evil intent, a *mens rea*, is dispensed with.⁴⁴ Under this mode of proceeding the court will generally refuse to consider any issue raised to show defendant's lack of evil intent.⁴⁵ The second way is to say that *mens rea*, or intent, (!) is necessary, and that *mens rea* is the intent to do that which in fact amounts to a violation of the law.⁴⁶ This intent may well have nothing to do with what to the common law is known as *mens rea*. Courts applying this rule confuse *mens rea* with mere mental self-direction, or mere *mens*.⁴⁷ The early West Virginia Supreme Court of Appeals followed the former approach, as I shall now demonstrate.

The West Virginia history of criminal liability without fault began in the field of liquor regulation, a field where the fanaticism of abstainers has wrought at least as much damage as the follies of drunkards. A statute forbade the sale of intoxicating liquors to minors, except upon parental order.⁴⁸ John Caine sold intoxicating liquor to Michael Toole who turned out to be a minor, although he had represented himself as an adult, and as one holding voting rights. In affirming the decree of the trial court, convicting Caine, the supreme court ruled

"that the seller may, sometimes, be deceived in information and judgment as to the age of a customer, as to his being a minor or not, is one of the perils he runs . . . Whether [he] . . . knew, at the time he made sale thereof, that the person to whom the sale is made is a minor or not, is immaterial under the law."⁴⁹

After discussing a number of out-of-state cases in accord, the court then concluded:

"If the legislature had intended that the seller of intoxicating drinks, whether licensed, or not, should only be subject to prosecution when he made sale to a minor, knowing him to be a minor, they would surely so have said in the law. But

⁴⁴ *State v. Buttery*, 95 Ohio App. 236, 118 N.E.2d 548 (1953), as limited by *City of Toledo v. Kohlhofer*, 96 Ohio App. 355, 122 N.E.2d 20 (1954). See discussion of the point in *State v. Schulte*, 224 Iowa 599, 50 N.W.2d 9 (1951).

⁴⁵ *E.g.*, *Magnolia Pipe Line Co. v. State*, *supra* n. 41.

⁴⁶ *E.g.*, *City of Newark v. Charlton Holding Co.*, 9 N. J. Super. 433, 74 A.2d 641 (1950); and *see State v. Long*, 5 Terry 251, 59 A.2d 545 (Del. Ct. Gen. Sess. 1948), *rev'd*, 65 A.2d 489 (Del. S. Ct. 1949).

⁴⁷ See ROBINSON, *CASES ON CRIMINAL LAW AND PROCEDURE* 424 (1949).

⁴⁸ W. VA. CODE c. 32, § 12 (1868), and W. Va. Acts 1872-3 c. 99, § 3.

⁴⁹ *State v. Cain*, 9 W. Va. 559, 571 (1876).

they have not said so, . . . and if they had so said, the law would manifestly have failed in a great degree to accomplish its manifest object."⁵⁰

Thus, the court joined the movement of overthrowing a few milleniums of human tradition, and of centuries of the common law, and made a crime that which the utmost care and *bona fides* could not have prevented. What caused the court thus to deviate from the common law? Undoubtedly, the members of the court were familiar with Mr. Bishop's *Commentaries on the Law of Statutory Crimes*, then only three years off the press.⁵¹ Bishop had stated the principle of statutory construction on the question of *mens rea* in these words:

"[T]he common law is not to be understood as having been displaced by a statute, unless the statute displacing it is, in its express words or necessary effect, plain and unequivocal. Within this proposition is embraced the minor one that, where a statute is drawn in general terms, no act within these terms is to be punished unless it proceeded from what the common law regards as a criminal mind."⁵²

Our court, therefore, should have held that since the statute on which the Caine prosecution was based was silent on the *mens rea*, it should be construed to require the usual criminal or evil intent, traditionally subject to the defense of an honest mistake of fact. Moreover, such a holding, it seems to me, was almost mandatory, since the court could not point to a single West Virginia or Virginia authority which would have warranted any other holding.

The court was quite aware of its trespass and sought to defend its holding. It reasoned that since the legislature had proclaimed the statute to be a "remedial" one, rather than penal,⁵³ a liberal construction—not in the favor of the defendant—was warranted.⁵⁴ It is quite true that remedial statutes ought to receive a liberal construction for the effectuation of the legislative purpose, and such was the rule then.⁵⁵ But what were remedial statutes? Bishop lists as examples "those extending the right of appeal; allowing redemption of real estate after a tax sale; providing for the settlement of disputes by arbitration . . .", and others.⁵⁶ In a later section Bishop continued:

⁵⁰ *Id.* at 576.

⁵¹ Boston (1873).

⁵² BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES 233 (1873), footnotes omitted.

⁵³ W. VA. CODE c. 32, § 40 (1868).

⁵⁴ State v. Cain, *supra* n. 49, at 576.

⁵⁵ BISHOP, *op. cit.* *supra* n. 52, §§ 120, 121. Footnotes omitted.

⁵⁶ *Id.* § 120.

"There are things which the law esteems odious; not indeed as being unnecessary, but odious in the sense in which a father feels it odious to inflict needful chastisement on a child; and, on the other hand, there are things in which the law delights. In respect to things odious, we are to employ a strict interpretation; and, in respect to things favored, a liberal one: as a father, in chastising his child, would keep within the necessity of the case to the letter; while, in bestowing a merited reward, he should cast in something also from affection. The law, for example, loves harmony and right; therefore it construes remedial statutes, made to amend some defects in the common law, liberally: it loves honesty and fair-dealing, and construes liberally statutes made to suppress frauds between individuals; and, generally, it employs a liberal interpretation for statutes which operate beneficially upon those whom they immediately concern. But enactments of the opposite character, taking away rights, or working forfeitures, or creating hardships of any kind, it construes strictly."⁵⁷

Now then, was the West Virginia statute in question one that operated beneficially upon those whom it immediately concerned—namely liquor dealers—or was it of a nature which took away rights, worked forfeitures, or created hardships of any kind?⁵⁸

It seems beyond doubt that the court went way too far in its application of the legislative mandate that the statute be a remedial one. A number of more reasonable courses would have been open: (a) The court could have ruled that liberal construction of a "remedial" statute does not go as far as to dispense with the traditional *mens rea* requirement, particularly so since the legislature had not said so *in expressis verbis*. (b) The court could have ruled that since the statute was decreed to be a remedial one, particular pains should be taken that the legislative purpose—the protection of minors from intoxicants—should be given effect. Therefore, special insistence on *mens rea* should be made, as tavern keepers, once punished for an honest mistake, would reason that since no amount of care can protect them, they might as well disregard the statute entirely. (c) The court could have denied to the legislature the right and power to declare white that which is black, remedial that which is penal.

Noticing that neither a doctrine nor cases of our jurisdiction supported the stand of the court, what did it have to rely on? There were a number of New England cases, particularly from Massachusetts, which seemed rather persuasive. All of these seemed

⁵⁷ *Id.* § 192. Footnotes omitted.

⁵⁸ The entire chapter 32 of W. VA. CODE 1868 deals almost exclusively with penalties and forfeitures.

to stand for the proposition that in this type of legislation—whatever the type embraced—a legislative silence on *mens rea* is tantamount to criminal liability for the mere causation of the prohibited act, no matter how much care had been taken to stay on the path of the law. Two adulterated milk cases from Massachusetts so held.⁵⁹ But in a later milk case the Massachusetts court expressed the belief that these cases went on the theory of “criminal carelessness” rather than absolute liability.⁶⁰ But in *State v. Cain* the West Virginia court, although citing all three milk cases, paid no attention to this advice.

The “adulterated milk rule” had its predecessor in the “adulterated marriage rule”. The first case to arise merely held that the prosecution in an adultery case need neither allege nor prove that the defendant bachelor knew his paramour to be married. The judges thought this to be a “matter of defence, to be averred and proved on his part.”⁶¹ But the judges in the *Cain* case seem to have missed that part of the opinion, or perhaps merely relied on Greenleaf’s citation of the case for a proposition which it does not uphold.⁶² But the next “adulterated marriage” case to arise in Massachusetts went considerably further. In *Commonwealth v. Mash* the Massachusetts court sustained the conviction of an honorable lady for bigamy.⁶³ It appears that her husband had fraudulently induced her to believe that he had died. The putative widow took the veil again within less than seven years, thus violating the statute. According to Mr. Bishop the case had been presented in a “muddled way”. Nevertheless, the case now stands for the proposition that bona fide and honest belief do not constitute defenses to conduct which the court deems to be absolutely forbidden on account of legislative silence on *mens rea*.

Next there were some cases for the protection of infants. The first infant to be protected by the Supreme Judicial Court of Massachusetts was an infant pig which ought not to have been butchered below the age of four weeks. Mr. Raymond did not know of the pig’s minority and was, therefore, convicted.⁶⁴ In two states further

⁵⁹ Keeping for sale, or selling, adulterated milk, not knowing it to be adulterated. *Commonwealth v. Farren*, 9 Allen 489 (Mass. 1864); *Commonwealth v. Waite*, 11 Allen 264 (Mass. 1865).

⁶⁰ See *Commonwealth v. Smith*, 103 Mass. 444 (1869). This case itself was decided under a more recent statute, expressly requiring knowledge of the adulteration, and providing for higher penalties.

⁶¹ *Commonwealth v. Ewell*, 2 Metc. 190, 192, 35 Am. Dec. 398 (Mass. 1840).

⁶² *State v. Cain*, *supra* n. 49, at 572.

⁶³ *Commonwealth v. Mash*, 7 Metc. 472 (Mass. 1844), in *State v. Cain* erroneously called *Commonwealth v. Marsh*.

⁶⁴ *Commonwealth v. Raymond*, 97 Mass. 587 (1867).

west the infants were human and ought not to have obtained intoxicating liquor from the defendant sellers, unless upon written order of the infants' parents. Honest mistake as to age was held to be no defense.⁶⁵

Quite in line with these decisions was *Barnes v. State* which furthered the protection of drunkards, or so it was believed, by holding that to be criminally liable, the defendant liquor seller need not have known the purchaser to be in the habit of becoming intoxicated.⁶⁶ In other words, the statute prohibiting sales of intoxicating liquor to persons in the habit of becoming intoxicated was held to impose liability upon anybody making such a sale, honest mistake or not.

Lastly, our court relied on *Commonwealth v. Boynton*.⁶⁷ This case stands for the proposition that sale of intoxicating liquor is unlawful even if the seller was unaware of its intoxicating quality, thus imposing liability without *mens rea*.⁶⁸

Based on this array of authority the West Virginia court planted the seed of absolute criminal liability in the fertile field of our jurisprudence. It is obvious that our judges must have had a good reason for imposing such an anomalous liability with no support save doubtful authority. The judges did not leave us in doubt about their good intentions: If the legislature had made *mens rea* a part of the offense, "the law would manifestly have failed in a great degree to accomplish its manifest object."⁶⁹ And further:

"The object of the act, as prescribed in the title thereto,⁷⁰ manifestly cannot be accomplished, except by construing [the offense to be one of absolute liability]. It is clear that without such construction, the said section, in relation to minors, would almost, if not quite, be inoperative and of no effect."⁷¹

To us today, without further guidance, neither the object nor the threatened failure of the object are manifest. But it is probably reasonable to assume that the court feared law enforcement with

⁶⁵ *State v. Hartfiel*, 24 Wis. 69 (1879), in *State v. Cain* erroneously cited as *State v. Hartell*, 24 Wis. 80. *Ulrich v. Commonwealth*, 6 Bush. 400 (Ky. 1869), in *State v. Cain* erroneously called *Ulrich v. Carpenter*. Both cases surprise because of their lack of citation of precedent.

⁶⁶ 19 Conn. 398 (1849).

⁶⁷ *Commonwealth v. Boynton*, 2 Allen 160 (Mass. 1861).

⁶⁸ It is rather noteworthy that the majority of the judges of the West Virginia Supreme Court of Appeals, twelve years later, thought that mistake of fact as to the intoxicating nature might be a defense. See *State v. Denoon*, 31 W. Va. 122, 125, 5 S.E. 315 (1888).

⁶⁹ *State v. Cain*, *supra* n. 49, at 576.

⁷⁰ "An Act Concerning Licenses." I can see no connection between the title of the act and its object, whatever it may be.

⁷¹ *State v. Cain*, *supra* n. 49, at 577.

regard to liquor might bog down unless the law itself had teeth. Now then, how can a law deter anybody which inflicts punishment for the mere doing of the outward act? Is it not manifest that a law which punishes without caring about the factual and moral blamelessness of a defendant thereby frustrates him and the community at large? Why should the citizen bother to use care if the courts do not bother whether or not he used care, inflicting punishment in any event? Punishment which befalls the innocent and the guilty alike, like hay fever, hail or hurricane, can have no good effect at all, except perhaps for insurance companies, for whom it creates a new insurable interest.

However unfortunate, absolute criminal liability was there and, like every noxious weed, grew in abundance, elsewhere even more than in West Virginia. *State v. Cain* set the pattern for a whole string of cases, most of which propounded the Cain rule without further discussion.⁷² *State v. Denoon* extended the rule of direct criminal liability without fault to one that operated even vicariously,⁷³ in accordance with the statute which forbade unlawful sales of intoxicating liquor by agent as well.⁷⁴ This form of liability is even more incongruous. Not only does the defendant in such cases lack a criminal intent, he even lacks the criminal act or omission. *State v. Denoon* set the pattern for *State v. Nichols*.⁷⁵ Here the principal was shown to have expressly forbidden his agent to make sales of liquor to minors, and had cautioned him to make careful inquiries before every sale. The facts of the case make it clear that defendant agent was culpably negligent in not ascertaining the facts before making the sale complained of. He was rightfully convicted, but convicted also was the innocent principal. The court's reasoning in this case is rather revealing:

If the defendant principal "were permitted to defend an indictment for unlawful selling, on the ground that his bartender has violated his instructions, the result would be that a conviction [of the principal] in many such cases could not be had, and the statute, in a large measure, would be defeated."⁷⁶

And what, one may ask, would be so catastrophic about not convicting the principal who has done all he can do to honor the law, while merely convicting the culprit who actually breached the

⁷² *State v. Gilmore*, 9 W. Va. 641 (1876); *State v. Baer*, 37 W. Va. 1, 16 S.E. 368 (1892) (liquor sales to minors); *State v. Farr*, 34 W. Va. 84, 11 S.E. 737 (1890) (liquor sale to person in the habit of drinking to intoxication).

⁷³ 31 W. Va. 122, 5 S.E. 315 (1888).

⁷⁴ W. Va. Acts 1877, c. 107, § 13.

⁷⁵ 67 W. Va. 659, 69 S.E. 304, 33 L.R.A. (N.S.) 419 (1910).

⁷⁶ *Id.* at 661.

law when, by the exercise of greater care, he could have avoided the breach? The court goes on:

"Such a defense is of a kind that is easy to manufacture to suit the emergency, yet difficult to overthrow, and many unscrupulous persons would not hesitate to fabricate such facts as would be needful to accomplish their defense."⁷⁷

The ease of manufacturing surreptitious or fraudulent defenses is, as any lawyer knows, not confined to cases such as the one before the court in *State v. Nichols*. Since the temptation to fabricate defenses is even greater in prosecutions in which the stakes are higher, for instance in murder prosecutions, why then not dispense with *mens rea* altogether and make every act, *e.g.*, the killing of a human being, conclusive evidence of a criminal intent to do the act, *e.g.*, killing a human being conclusive evidence of a criminal intent, thus murder?

It should be noted that none of the statutes on which the above cases were decided contained an express legislative dispensation with the *mens rea* requirement. There was mere legislative silence, judicially interpreted as a legislative intention to abrogate the principle of the common law.⁷⁸ The constitutionality of such an abrogation was tested in *State v. Woodward*.⁷⁹ The defendant was charged with having kept his saloon open on a Sunday, in violation of statute. There was no evidence that liquor had been sold, or that other harm had resulted. The defendant's conviction was upheld, and the attack on the constitutionality of the dispensation with the common law *mens rea* requirement was dismissed. The legislature, so the court said, has an unlimited power to create offenses at pleasure, as long as due process is not violated, and such was ruled not to have been the case here. Nor was the punishment found to be cruel and unusual.⁸⁰

Perhaps I have stayed unduly long with the liquor cases. The substantive law of these cases has long become obsolete. The shifting of all liquor sales to the State Liquor Control Board has acted as *deus ex machina* and removed absolute criminal liability from this class of offenses by simply removing these offenses. But

⁷⁷ *Ibid.*

⁷⁸ To the best of my knowledge no West Virginia statute ever contained an express abrogation.

⁷⁹ 68 W. Va. 66, 69 S.E. 385, 30 L.R.A. (N.S.) 1004 (1910).

⁸⁰ The case raised an interesting side issue. Would necessity be a defense? The court rightfully refused to answer the question in the instant case. Since no such defense has been interposed in any absolute liability case in this state, the issue remained unresolved. Today the question is virtually moot under West Virginia law, and in other states there is a split of opinion.

liquor was the first nourishment for absolute criminal liability in West Virginia, therefore the emphasis.

It is a remarkable fact that while in other states the doctrine spread rapidly into the entire body of regulatory offenses, in West Virginia the growth of the noxious weed, called absolute criminal liability, was hardly noticeable for many decades. Not even noxious weeds, it seems, will grow when sprinkled with liquor. The liquor cases, particularly *State v. Cain*, to be quite sure, were still being cited, but now with caution. In the field of sex crimes, where the judges in many other states were particularly eager to apply absolute criminal liability, our court proceeded with particular caution. *State v. Pennington* was an incest prosecution.⁸¹ The indictment failed to allege that the defendant was aware of the kinship tie with his lady love. The court found that such an allegation was not necessary, since the statute did not make the absence of such knowledge a requirement. The court then cited a Connecticut case which stands for the proposition that ignorance of relationship is no defense to an indictment for incest.⁸² "It must be allowed to doubt so much of the opinion as holds that knowledge of the relationship by the accused is not necessary," said Judge Brannon for the West Virginia Supreme Court of Appeals.⁸³ This, then was the first spell of doubt cast upon the wholesomeness of the doctrine of absolute criminal liability in West Virginia.

If liquor was the first nourishment for the weed, liquor must also be credited with having been one of its principal antidotes. Truly, the legislature, *nolens volens*, had helped a little. In *State v. Smith*, the court was confronted with a statute which, *inter alia*, attempted to punish an agent who delivered an out-of-state shipment of intoxicating liquor to any person within this state, "except to a person having a State license to sell the same, or to the *bona fide* consignee thereof."⁸⁴ Blake, the addressee of a box marked "Glass", had neither a license to sell, nor was he a *bona fide* consignee within the definition of the statute. But when asked by Smith before the delivery of the box (in fact containing liquor), Blake pretended to be a *bona fide* consignee and signed an affidavit to this effect. Under the *Cain* rule the court ought to have sustained

⁸¹ 41 W. Va. 599, 23 S.E. 918 (1896).

⁸² *State v. Dana*, 59 Vt. 623, 10 Atl. 727 (1887).

⁸³ But is it not frustrating to note that more recently our court well nigh reversed itself in the sex crime field? See discussion of *State v. Taylor*, nn. 115-123, *infra*.

⁸⁴ *State v. Smith*, 61 W. Va. 329, 330, 56 S.E. 528 (1907).

Smith's conviction. But the judges did not follow Cain. Approving Mr. Bishop's position, the court found the words "bona fide" to be the proper straw to cling to. By using such words, so the court argued, the legislature really had not been silent on the matter of *mens rea*. Hence, honest mistake of fact on the part of Smith could be used as an excuse. The argument of the court is well composed, though a little roundabout—which was, of course, necessary. The result must be hailed:

"Smith acted honestly and in good faith. If such agent delivers a box or package containing liquor, but not disclosing the character of its contents, does the statute mean that he is guilty, though he may not have known the contents? Must the agent investigate every box? How? He cannot break the box. If he makes fair investigation, and has reasonable ground to believe the box does not contain liquor, is he nevertheless guilty? Is that the real meaning of the statute? This doctrine may, in many cases, defeat the design of the statute; still, we must not give the act a construction to promote injustice, and inflict punishment on the innocent agent."⁸⁵

This argument, of course, is not really confined to Mr. Smith and the box marked "Glass". It is a beautiful summary of the whole argument against the use of absolute criminal liability.

It was only eight years later that the West Virginia court dealt another severe blow against the friends of absolute criminal liability. Again, liquor was the battle ground. A statute had attempted to make the possession of intoxicating liquor *conclusive* evidence of "unlawful keeping, storing and selling." While the court's opinion is not clothed in terms of *mens rea*, the decision is clear enough: "Under such circumstances," the court said, "a person might be convicted without due process of law. It has been truly said, that 'closing the mouth of a person when he comes into court has the same effect as depriving him of his day in court to vindicate his rights.'"⁸⁶ Since this decision the West Virginia legislature has made no further attempts to dispense with a *mens rea* by the legislative creation of an irrebuttable presumption of partial or entire guilt; and neither before nor after this decision has any West Virginia statute attempted to abrogate the *mens rea* requirement expressly, from all that appears.

The moonshine era provided further antidotes, and our judges gave proof of their alertness. Proper results were reached although the statutes said little more about the *mens rea* requirement than

⁸⁵ *Id.* at 333.

⁸⁶ *State v. Sixo*, 77 W. Va. 243, 87 S.E. 267 (1915).

did the statute in *State v. Smith*. The possession of a moonshine still, by itself, it was held, is not unlawful. There must be an unlawful intent, namely the intent to use the still in violation of the law.⁸⁷ And so with the possession of mash, and even the possession, or transportation, of contraband liquor itself.⁸⁸

Unfortunately, during this era of growing enlightenment a few cases were decided that are almost worthy *State v. Cain*. *State v. Furr* and *State v. Lorentz*,⁸⁹ consolidated for decision, upheld the convictions of pool room managers for permitting minors to play pool, in violation of a statute which was silent on intent. Ignorance and good faith were held to be beyond judicial recognition.

State v. Harris, an outrageous prosecution for contributing to the delinquency of a minor, upheld the conviction of the boy friend of a fifteen year old girl, who frequently dated her, sometimes keeping her out late, against her father's wishes (which may, or may not, have been known to the defendant). The girl, so it seems, did not become delinquent. But that was not necessary under the statute. The boy had no intention to contribute to his girl friend's delinquency. But that was not necessary under the statute either.⁹⁰

State v. Masters,⁹¹ construing the West Virginia hit-and-run statute,⁹² came close to the imposition of absolute liability with this language:

"The statute in the instant case does not make knowledge of the accident a part of the offense, and, under the general rule, it is not necessary for the State to so allege. To hold otherwise would be to defeat the very object of the statute. . . . In most cases it would be impossible for the State to prove *scienter* beyond a reasonable doubt, while the accident itself might properly be proven."⁹³

The first thing that comes to the reader's mind is the question: Is it not clear that a crime which the state cannot prove cannot

⁸⁷ *State v. Edgell*, 94 W. Va. 198, 118 S.E. 144 (1923); *State v. Moore*, 95 W. Va. 604, 122 S.E. 147 (1924); *State v. Bermawitz*, 98 W. Va. 637, 127 S.E. 494 (1925); *State v. Haller*, 112 W. Va. 4, 163 S.E. 635 (1932).

⁸⁸ *State v. McHenry*, 93 W. Va. 396, 117 S.E. 143 (1923); *State v. Cirrillo*, 96 W. Va. 253, 122 S.E. 655 (1925); in a prosecution for the possession of mash it must be established that there was an intent to use it for the purpose of illegally making intoxicating liquor. *State v. Lough*, 97 W. Va. 241, 124 S.E. 608 (1924); *State v. Lambert*, 100 W. Va. 377, 130 S.E. 520 (1925); *State v. Lee*, 103 W. Va. 631, 138 S.E. 323 (1927); *State v. Sprague*, 111 W. Va. 32, 161 S.E. 24 (1931); on possession or transportation of liquor.

⁸⁹ 101 W. Va. 178, 132 S.E. 504 (1926).

⁹⁰ 105 W. Va. 165, 141 S.E. 637 (1928).

⁹¹ 106 W. Va. 46, 144 S.E. 718 (1928).

⁹² W. VA. CODE c. 46, § 97 (Barnes 1923).

⁹³ *State v. Masters*, n. 91, *supra*, at 48-49.

lead to the conviction of anybody? That has been so since time immemorial, and there is nothing wrong with this rule. Truly, it is difficult to prove *scienter* beyond a reasonable doubt in a hit-and-run case. But would it not suffice to relax the rule just a little, so as to permit the state to prove a *prima facie scienter*, and leave the rebuttal up to the defendant, rather than to overthrow a salutary rule of law entirely? The state, for instance, could be permitted to prove that on a clear day (no thunder or rain) the defendant drove in a 45 mph. zone and sideswiped a parked car. It could also prove that the impact of hollow metal on hollow metal at the thrust of 45 mph. creates a noise of about 80 decibels (or whatever the amount may be) above the minimum level of human audibility. Then the state should be permitted to rest its case on the question of *scienter* and, unless the defendant can rebut the presumption of knowledge arising from the proof of these facts, it is entitled to a conviction. The defendant, in rebuttal, may prove that the car travelled at a speed of only 10 mph., or that he is hard of hearing and cannot perceive sounds of 80 decibels above minimum human audibility. He may prove that the impact of the sideswiping was slight and did not create the alleged amount of decibels. He may prove that while the impact occurred, an express train was passing on the tracks alongside the road, making it impossible to hear sounds, etc. But why should any chance be taken from the defendant to prove his innocence? If rebuttal is not permissible, unjust convictions may result, however remote the possibility may be. Read with pink glasses, with the reader's fingers crossed, and with much confidence in the future, the language of the court in *State v. Masters* may perhaps be so narrowly construed as to still leave it up to the defendant in future cases to rebut the presumption of *mens rea*, arising without any proof of *scienter*.

The cases arising under the narcotic drug act found a reasonable disposition by the court, similar to that accorded the moonshine cases.⁹⁴ The typical offense charged under the act is that of possession with intent to sell. This unlawful intent need not be alleged in the indictment. Nevertheless, so both West Virginia cases in point make clear, the intent is material.⁹⁵

Another area in which the West Virginia court refused to disregard the defendant's *mens rea* is that of the unlawful possession

⁹⁴ W. Va. Acts 1911, c. 16, § 2, now Uniform Narcotic Drug Act, W. Va. Acts 1935, c. 46.

⁹⁵ *State v. Sutter*, 71 W. Va. 371, 76 S.E. 811, 43 A.L.R. (n.s.) 399 (1912); *State v. Hinkle*, 129 W. Va. 393, 41 S.E.2d 107 (1946). For further discussion of these cases see n. 131, *infra*.

of weapons. In *State v. Underwood* the court declared that the casual examiner cannot be held guilty under a statute making it criminal to possess weapons without license, except in the possessor's own home.⁹⁶ The statute was absolutely silent on *mens rea*! Similarly, in *State v. Cline* the court found that it had properly been left to the jury to determine whether the defendant, charged with the unlawful possession of a weapon, had acquired the weapon lawfully during the performance of his duties as a justice of the peace, and was properly carrying the weapon to a safe place.⁹⁷

The most famous of the West Virginia cases in this area of criminal law is *State v. The Great Atlantic & Pacific Tea Company of America*,⁹⁸ with its just as masterly as brief opinion by Judge Hatcher, written for a unanimous court. Defendant company was indicted for a short weight sale by one of its agents, contrary to the weights and measures statute.⁹⁹ While the statute used the word "knowingly" in some of the violations it lists, there is silence on *mens rea* with respect to short weight sales. I quote from the opinion:

"It is too elementary to call for citation of authority that under the common law it has been the general rule for centuries that there can be no crime without criminal intent [*mens rea*]. (Such intent is of course the offspring of knowledge express or implied.) It is contended by the state, however, that the legislature has the power to eliminate the element of intent from statutory crimes. Even so, that purpose should be so *clearly expressed* as to leave no room for doubt Where a merchant employs a large number of salesmen, as does the defendant, it is physically impossible for him to supervise personally every sale. Consequently, the construction of the statute sought by the state would make criminal an act which the utmost good faith and care of the merchant could not prevent. Such a departure from the common law, so violative of traditional conceptions of justice and so unfair to honorable merchants, is not to be inferred from the mere placement of a semi-colon, as contended by the state."¹⁰⁰

There was no mention of *State v. Cain* with all its ugly shoots. The test created by the *A. & P.* case was a new one: Criminal liability, to be absolute, needs a "clearly expressed" legislative intention.

⁹⁶ 89 W. Va. 548, 109 S.E. 609 (1921).

⁹⁷ 125 W. Va. 63, 22 S.E.2d 871 (1942).

⁹⁸ 111 W. Va. 148, 161 S.E. 5 (1931), hereinafter in the text called the *A. & P. case*.

⁹⁹ W. VA. CODE c. 59, § 29 (Barnes 1923).

¹⁰⁰ *State v. Great Atlantic & Pacific Tea Co. of America*, *supra* n. 98, at 149-50. Emphasis mine. For a contrary view see Horack, *In the Name of Legislative Intention*, 38 W. VA. L.Q. 118, 124 (1932).

Let us remember this and mark it down as the *West Virginia Rule*. It is necessary today to note such matter. In far too many American states the rule seems to fall below this minimum requirement of justice.

Everything would be well with our *West Virginia Rule*, were it not for two later cases which leave me with a somewhat uneasy feeling. There is first the famed *C. & P. Telephone* case.¹⁰¹ The telephone company was indicted for having unlawfully furnished horse racing messages over its wires to a poolroom, contrary to statute. In affirming an order of the district court which overruled the demurrer, Judge Kenna wrote in the majority opinion:

"Whether the indictment is demurrable because it does not allege that the offense was 'knowingly' committed, we think, should be considered in the light of the fact that this offense is *malum prohibitum*, not *malum in se*. The statute in question does not require that the act prohibited should be knowingly done. We do not see why this question is to be distinguished from the question which was raised in the cases involving the sale of intoxicating liquors to minors. The statute under consideration in those cases did not require knowledge, and this Court held that for that reason the indictments need not allege that the offense was knowingly committed. *State v. Smith*, 61 W. Va. 329, 562 S.E. 528; *State v. Furr*, 101 W. Va. 178, 132 S.E. 504."¹⁰²

State v. Smith and *State v. Furr* had long been discredited by a unanimous court in the *A. & P.* case. It is not at all clear why Judge Kenna totally ignored that later case. Fortunately, though, that part of the opinion which interests us here is not the law in West Virginia. Judge Kenna's ruling was carried by a majority on other grounds. On the point in question Fox, President, and Hatcher, Judge, dissented. The state, President Fox pointed out, had gone as far as to concede that "lack of knowledge would be a defense to the charge."¹⁰³

"The majority opinion does not follow the concession of the state, and would consider lack of knowledge only in mitigation of punishment, but in my opinion, the failure to show

¹⁰¹ *State v. Chesapeake & Potomac Telephone Co.*, 121 W. Va. 420, 4 S.E. 257 (1932), hereinafter in the text called the *C. & P. Telephone* case. A well written comment on the case may be found at 46 W. VA. L.Q. 175 (1940). The commentator, unfortunately, falls into some common traps.

¹⁰² *State v. Chesapeake & Potomac Telephone Co.*, *supra* n. 101, at 424.

¹⁰³ *Id.* at 426.

knowledge on the part of the state would entitle it to a verdict of acquittal."¹⁰⁴

Judge Riley specially concurred in the majority opinion, but was likewise of the opinion "that lack of knowledge and reasonable grounds of knowledge that defendant's wires were being used in violation of the statute is a good defense."¹⁰⁵ Thus, on the question of absolute criminal liability the majority opinion is the minority opinion.

Two factors in this opinion deserve particular discussion. Judge Kenna based his ruling on the distinction between *mala in se* and *mala prohibita*, implying that the common law *mens rea* requirement applied to the former, but not to the latter. The supposed distinction between *mala in se* and *mala prohibita* is older than absolute criminal liability. Clark and Marshall¹⁰⁶ point out in their treatise that this distinction

"is frequently unfounded, and even as early as 1822 an English Judge said that the distinction had long since exploded.¹⁰⁷ Presently it seems to get its greatest use by misinformed or lethargic courts who insert it as a prop to rationalize preconceived results."¹⁰⁸

Kenny criticised the distinction between *mala in se* and *mala prohibita* with the words: "This defective classification of crimes clearly formed an unsound premise from which to draw any jurisprudential conclusions" ¹⁰⁹ All writers agree that this supposed distinction is one between things not inherently alien. The line of demarcation is vague and fluctuating, from day to day, and from county to county. Truly, among the members of a given community at a given time some offences are regarded as grave, others as slight. A reliable guide, however, can be established only by the action of the community as a whole, namely through legislative fiat. We have such fiats on the distinction between crimes and misdemeanors. We have none on the distinction between

¹⁰⁴ President Fox argued particularly that otherwise an impossible burden would be cast upon the Telephone company. "Being under [a statutory] requirement of service, I cannot believe it was intended to make its compliance therewith a crime, unless done with knowledge that an unlawful act was thereby aided." *Ibid.*

¹⁰⁵ *Id.* at 424.

¹⁰⁶ CLARK & MARSHALL, TREATISE ON THE LAW OF CRIMES 13 (5th ed., Kearney 1952).

¹⁰⁷ "Best, J., in *Bensley v. Bignold*, 5 Barn. & Ald. 335." Kearney's footnote.

¹⁰⁸ "See the following note, *The Distinction Between Mala Prohibita and Mala in Se* in Criminal Law, 30 COL. L.R. 74, which criticizes the distinction." Kearney's footnote. This student note contains an excellent collection of authorities.

¹⁰⁹ TURNER, KENNY'S OUTLINES OF CRIMINAL LAW § 17 (1952).

mala in se and *mala prohibita*. The personal opinions as to the latter distinction, voiced by even the most informed, are so utterly unreliable as to furnish no guide, *vide* Coke and Blackstone.¹¹⁰

Therefore, it is indefensible to use so vague a distinction as a criterion for the dispensation with one of the pillars of our common law justice, the *mens rea* requirement, as Judge Kenna attempted to do.¹¹¹

The second point in Judge Kenna's opinion deserving special mention is his dictum to the effect that "[t]he lack of knowledge, it is to be assumed, would be considered by the trial court in mitigation of punishment"¹¹² I have noted before that three judges voiced their disagreement. All other arguments in favor of absolute criminal liability failing, it has sometimes been reasoned that the raising of issues in defense of regulatory violations would require dealing with collateral and irrelevant issues. Hence, too much time, in proportion to the slightness of the offense, would have to be devoted to the matter if the defendant were permitted to present an elaborate defense, or, indeed, any defense. It has been said that courts would never be able to clear their calendars if in this vast mass of petty offenses a judge, or a jury, were to try all defensive facts. Speediness of "justice" is said to be the compelling reason for absolute criminal liability.¹¹³

If this were truly the only, or major, reason for resort to absolute criminal liability, then it would be sheer folly to dispense with the *mens rea* and nevertheless to consider all defensive arguments for the purpose of possibly mitigating the punishment, as Judge Kenna attempted to do. Of course, this only goes to show that the "speediness of justice" argument is absurd. The choice does not lie between speedy justice and slow justice, but between speedy injustice and justice of whatever celerity we can achieve by whatever court reform may be necessary. Justice ought to be speedy, but absolute criminal liability is not apt to achieve it.

This brings me to a point which has been made by the commentator of the *C. & P. Telephone* case. After repeating an argument which I have already refuted in my discussion of the *Cain* case—that the "manifest object" of the statute would have failed—

¹¹⁰ *Id.* at 22.

¹¹¹ *E.g.*, Note, 46 W. VA. L.Q. 175 (1940), accepting this distinction without hesitation. See Mr. Sayre's discussion on the impossibility of the distinction, *Public Welfare Offenses*, 33 COL. L. REV. 55, 70-71 (1933).

¹¹² *State v. Chesapeake & Potomac Telephone Co. of West Virginia*, *supra* n. 101, at 424.

¹¹³ Sayre, *Public Welfare Offenses*, 33 COL. L. REV. 55, 69-70 (1933).

the writer says: "As the penalty is slight, no great injustice is perpetrated by enforcing this type of statute regardless of knowledge."¹¹⁴ Are we compelled to prefer small injustice over justice? I do not think that the writer regarded this point as a major reason for the imposition of absolute criminal liability. But even as collateral support it fails miserably. Such reasoning may be appropriate in a country where absolutism and dictatorial utility sacrifice life, liberty and property to the Moloch state, but not here.

Fortunately, as mentioned before, on the question of absolute criminal liability, the majority opinion of the *C. & P. Telephone* case stands without any binding power. But there is a second recent case which rests like a cloud on the authority of the wholesome rule of the *A. & P.* case, although it does not amount to more than a dictum. This is *State v. Taylor*.¹¹⁵ A statute threatens punishment to "any person who shall receive . . . any person into any house . . . for the purpose of prostitution."¹¹⁶ Tracy Taylor was caught red-handed, so to speak, violating the statute. But she contended that the indictment was bad because it merely charged that the acts were done unlawfully, and the word unlawfully "can not take the place of a statement that they were done knowingly or with knowledge."¹¹⁷ Judge Haymond properly found: "That argument is unsound."¹¹⁸ But he went further and said: "When the statute is silent, as here, concerning the knowledge of the defendant, the indictment need not allege that [s]he possessed such knowledge. *State v. Furr*, 101 W. Va. 178, 132 S.E. 504."¹¹⁹ This is partially right, partially wrong. Nobody will quarrel with the statement that whenever a statute is (absolutely) silent on *mens rea*, no *mens rea* need be alleged in the indictment. Such is the well established rule in this state, and it is not overly dangerous. Whether knowledge is in fact an element of the offense or not is a different question.¹²⁰ But so much of Judge Haymond's sentence as states that this statute is silent on *mens rea*, is not authoritative. It is conceded that what the statute demands, the state must allege and prove.¹²¹ This statute demands that the state allege and prove that the defendant received any person into any house for the *purpose of prostitution*.

¹¹⁴ 46 W. Va. L.Q. 175, 177 (1940).

¹¹⁵ 130 W. Va. 74, 43 S.E.2d 549 (1947).

¹¹⁶ W. Va. Acts 1943, c. 30, art. 8, § 5 (a). Emphasis mine.

¹¹⁷ *State v. Taylor*, n. 115, *supra*, at 82.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ Though it is not without bearing on the determination of the necessity for knowledge as an element of the offense, as the cases discussed so far seem to indicate.

¹²¹ With the exception of surplusage, which is certainly not involved here.

Thus, if the state merely proves that the defendant admitted a person, etc., into any house, the charge under the statute is not made out, just as the statute would not be satisfied if the defendant received a person, etc., for the purpose of singing lessons or playing chess. Hence, if the state, as it must, proves that the defendant received, etc., *for the purpose of prostitution*, it proves an evil purpose on the part of the defendant. That is the crux of *mens rea*. The statute, therefore, is not at all silent on *mens rea*. In fact, the reported decision makes it abundantly clear that the state had in fact proved such an evil design on the part of the defendant, without a shadow of a doubt.

The decision is also out of line with the established rule of construction of the court. The moonshine statutes were construed precisely in the way which I have indicated as the proper one for the prostitution statute. These required the possession of a moonshine still "*for the purpose of distilling . . . intoxicating liquor. . .*"¹²² And this language had been held to be indicative of the *mens rea* requirement in *State v. Edgell*.¹²³

Judge Haymond's criticised language is dictum, and the actual holding goes no further than to permit the state to leave *mens rea* allegations out of the indictment when the statute is silent. So much is sound law, and not in conflict with the *A. & P.* case. Since the *C. & P. Telephone* case likewise did not affect the *A. & P.* case, the latter is the law in West Virginia. We have some indication that the court will adhere to this salutary decision. Most recently the court was confronted with Code section 61-10-1 (keeping or exhibiting gaming table or device), a statute which prior to the *A. & P.* case would undoubtedly have been construed as imposing absolute criminal liability. Today the court required an "evil intention" on the part of the offender as one of the requisites "to establish his guilt beyond a reasonable doubt."¹²⁴

I may be permitted to summarize as much of our law as is necessary for the understanding of the main rule:¹²⁵

(1) *Mens rea* (criminal intent or negligence) is an essential element of every crime, demanded by the common law, and by common sense.¹²⁶

¹²² W. VA. CODE c. 32A, § 37 (Barnes 1923).

¹²³ *State v. Edgell*, 94 W. Va. 198, 118 S.E. 144 (1923). And see n. 86, *supra*.

¹²⁴ *State v. Calandros*, 86 S.E.2d 242, 246 (W. Va. 1955). The issue was whether or not defendant could be charged with knowledge of the fact that his device was a gambling device and was used as such.

¹²⁵ In this summary no attempt will be made to cite all West Virginia cases for every proposition.

¹²⁶ *State v. Edgell*, 94 W. Va. 198, 206, 207, 118 S.E. 144 (1923).

(2) *Actus reus* and *mens rea* (forbidden act and evil mind) must concur to constitute the crime.¹²⁷

(3) The legislature has been given the power to dispense with the requirement of *mens rea* in petty offenses of a regulatory nature. Thus, it may impose absolute criminal liability.¹²⁸

(4) But any legislative intention to dispense with the *mens rea* requirement must be "clearly expressed."¹²⁹

(5) Particularly in the area of vicarious criminal liability (such as that of a principal for the unlawful act of his agent) the rule listed under (4), *supra*, must be heeded. The principal cannot be held criminally responsible for the act of his agent, where the principal acted without blame.¹³⁰

(6) Whenever the statute contains no clearly expressed intention to dispense with *mens rea*, the common law rule will be applied, and a general intent to do the prohibited act with knowledge of all material facts—particularly those that mark the border between the lawful and the unlawful conduct—will be required.¹³¹

It follows that if in our code there is no statute—and I believe there is not—in which a legislative intention to abandon the common law rule by dispensing with the *mens rea* requirement is "clearly expressed", then we have no absolute criminal liability in West Virginia, as of this day and year. Older instances of absolute criminal liability antedate the new rule and are no longer governing. It is a further fact that not only did the legislature insert no express abrogation provision into any of the statutes passed since the *A. & P* case was decided, but in many of the regulatory statutes it expressly inserted *mens rea* considerations. For example, in a number of other states the offense of driving without any of the required lights on an automobile is one of absolute liability.¹³² But the West Virginia legislature, by chapter 90 of the Acts of 1939—rather than to make for a useless liability of the violator despite care—provided that: The proper state personnel may stop vehicles suspected to be improperly equipped. An inspection will follow. If the vehicle is found to be improperly equipped, an order will be given to repair the vehicle, or to cure the defect,

¹²⁷ *Id.* at 206.

¹²⁸ *State v. Woodward*, 68 W. Va. 66, 69 S.E. 385, 30 L.R.A. (N.S.) 1004 (1910).

¹²⁹ *State v. The Great Atlantic & Pacific Tea Co. of America*, 111 W. Va. 148, 161 S.E. 5 (1931).

¹³⁰ *Ibid.*

¹³¹ *Ibid.*; *State v. Sprague*, 111 W. Va. 132, 134, 162 S.E. 24 (1931).

¹³² Annotation, 11 A.L.R. 1226; 8 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW & PRACTICE § 5370 (1950).

within five days, and then to submit to renewed inspection. In brief, while everybody is required to have his automobile properly equipped with lights, punishment for violation will not be imposed on the guilty and the innocent alike, but only on the stubborn offender who fails to comply after warning. But this intelligent way of dealing with the *mens rea* problem in regulatory penal law antedates the *A. & P.* case. In fact, examination of the older statutes leads to the conclusion that absolute criminal liability, if intended at all, was the exception, and a rare one at that, rather than the rule, some dicta in old cases notwithstanding. Thus, our automobile light statute has long provided that in case of a bona fide (!) failure of the lights, the operator may proceed to a safe place of repair, observing special safety rules. Again, the statute takes the frame of mind of the violator into consideration.

While liability imposed regardless of care fails to have any deterrent effect upon either the offender or the community at large, liability imposed only after failure to heed a warning certainly singles out for punishment the truly guilty person while, in addition, having a general deterrent effect.

The use of the prior warning method is not restricted to drivers without head- or tail light. The West Virginia worthless check act employed the same method. The statute prohibited the issuing of any check without sufficient funds to cover it. The command seemed absolute. But to single out the evil-spirited offender for punishment, the statute provided also that payment of the check within twenty days after notice of protest will relieve the offender of criminal liability.¹³³

The law of West Virginia has employed various other methods in preference to absolute criminal liability. There is primarily the device of shifting the burden of proof. *Mens rea*, i.e., intent to produce the unlawful state of affairs, will be presumed, until the defendant who is proven to have brought about the state of affairs, will have rebutted this presumption of his guilty mind. The method has been used successfully in liquor legislation,¹³⁴ as well

¹³³ *State v. Pishner*, 72 W. Va. 603, 78 S.E. 752 (1913). The act was later amended, and now even requires proof of fraudulent intent. *State v. McGinnis*, 116 W. Va. 473, 181 S.E. 820 (1935).

¹³⁴ E.g., sale of liquor by an unlicensed druggist raises a rebuttable presumption that the sale was unlawful. *Miles v. State*, 5 W. Va. 524 (1872); *State v. Bluefield Drug Co.*, 43 W. Va. 144, 27 S.E. 350 (1897); *State v. Davis*, 68 W. Va. 142, 69 S.E. 369, 33 L.R.A. (N.S.) 501, A.A.C. 1912A 999 (1910). A criminal intent is rebuttably presumed from the act of carrying liquor in violation of statute, *State v. Boggs*, 103 W. Va. 641, 645, 138 S.E. 321 (1927).

as in narcotics legislation.¹³⁵

A further alternative of dealing with regulatory offenses is by changing the liability from a criminal to a civil one. Frequently the civil remedy is much more effective in deterring potential wrongdoers. At least in case where the harm is inflicted upon a determinable person, or persons, rather than the state as a whole, the civil sanction is preferable. The former West Virginia civil damage act provides us with an example.¹³⁶ *State v. Farr*,¹³⁷ it will be remembered, stands for the proposition that anybody who sells intoxicating liquor to a person in the habit of becoming intoxicated will be punished regardless of *mens rea*. In many states such is still the law today. The remoteness of likelihood of penal consequences for every uninvestigated sale of an intoxicating drink, as well as the practical impossibility to make an investigation before every sale of a drink, cause sellers of drinks to disregard the law, thereby making such a law practically ineffective. How much more effective was the civil damage act by permitting a dependent of any person injured on account of intoxication to recover damages from the saloon keeper who permitted the injured person to drink to intoxication? To prevent hardships to truly innocent saloon keepers the statute required the plaintiff to prove defendant's knowledge that the injured person drank to intoxication, or was in the habit of becoming intoxicated.¹³⁸ Further investigation may well lead to the conclusion that in many instances in which the law imposes criminal liability today, a civil remedy will operate much more effectively.

Furthermore, where today absolute criminal liability is often deemed the only solution to a grievance, a liability based on negligence often will be more effective. For instance, suppose the law would command a building association absolutely to loan money only for the legitimate use for which the statute permits it to charge a high interest rate which otherwise would be usurious.

¹³⁵ W. Va. Acts 1911, c. 16, § 2, made possession of cocaine with intent to sell a crime. The mere possession was prima facie evidence of intent to sell. Unless rebutted, mere averment and proof of possession would lead to conviction. *State v. Sutter*, 71 W. Va. 371, 76 S.E. 811, 43 L.R.A. (N.S.) 399 (1912), decided under the Uniform Narcotic Drug Act, W. Va. Acts 1935, c. 40.

¹³⁶ W. Va. Code c. 32, § 26 (1906), repealed with creation of the W. Va. Liquor Control Board by W. Va. Acts 1935, c. 4.

¹³⁷ 34 W. Va. 84, 11 S.E. 737 (1890), *supra* n. 72.

¹³⁸ *Duckworth v. Stalnaker*, 68 W. Va. 197, 69 S.E. 850 (1910); *Greer v. Arrington*, 72 W. Va. 693, 79 S.E. 720 (1912). It is clear that where the defendant can not be charged with that much *scienter*, no blame can attach, and no liability ought to follow.

If a borrower would then divert the money so loaned for another use, the building association would be guilty of usury, no matter how much care it took to prevent misuse. But if negligence becomes the test, then the building association is criminally liable only if it fails to use due diligence in ascertaining that the funds are properly applied.¹³⁹

The absolute law works toward frustration and apathy since penalty does not depend on lack of exercise of care, the negligence law works toward diligence, by excepting the honest and diligent from punishment.

There are, it seems, a multitude of answers to the menace of absolute criminal liability. In a case note in the *West Virginia Law Quarterly* one writer pointed to the task which Equity could perform in the fight against criminal social evils.¹⁴⁰ Usury is one of the fields where Equity can provide for a remedy better than that of absolute criminal liability. Frequently such an extension will need legislative help.¹⁴¹

This article does not claim to be an exhaustive survey of the problem of absolute criminal liability. If it has indicated the general development and status of this evil, and stated the law as it was and is in this state, it has accomplished its basic purpose. But I had one other objective: There are but a few jurisdictions in the common law world in which absolute criminal liability has been rejected. West Virginia can be counted among these few states. Elsewhere the use of absolute criminal liability is as superabundant as ineffective of good results, or even harmful. But the argument in favor of it is repeated again and again: absolute criminal liability or breakdown of justice. This is a slogan without merit. In having indicated alternative solutions which have been successfully applied in this state, and by now pointing to the fact that West Virginians can not complain of a breakdown of their law enforcement, I hope to have shown to the advocates of absolute criminal liability, how shaky their stand, how absurd their law, and how unjust their justice are.

It is only fair to conclude this discussion with a summary list of the rules in the various jurisdictions, as indicative of the position of the *West Virginia Rule*.

There are at least nine official positions on the question of absolute criminal liability:

¹³⁹ Pfeister v. Wheeling Building Ass'n, 19 W. Va. 676, 715-720 (1882).

¹⁴⁰ Note, 38 W. VA. L.Q. 65 (1932).

¹⁴¹ See CLARK, EQUITY 656-671 (1954).

MENS REA AND THE LAW

(1) A constitutional prohibition of all criminal liability except that based on *personal conscious wrongdoing*.¹⁴²

(2) A declaration of unconstitutionality, as violative of due process, and as vague and uncertain, of any statute which would "make an act, innocent in itself, a crime, and criminals of those who might perchance fall within its interdiction, * * * [and which tends] to embrace within its ambits the guilty and the innocent alike, [because t]his would afford no reasonable ascertainable standard of guilt."¹⁴³

(3) A judicial rule outlawing all criminal liability except that based on *personal conscious wrongdoing*, thus absolutely requiring all statutes to be interpreted in the light of the principle of criminal law that evil act and evil mind must concur (common law rule).¹⁴⁴

(4) A mistake of fact statute:

"If a person laboring under a mistake of fact shall do an act which would otherwise be criminal he is guilty of no offense, but the mistake of fact which will excuse must be such that the person so acting under a mistake would have been excusable had his conjecture as to the fact been correct, and it must also be such mistake as does not arise from a want of proper care on the part of the person so acting."¹⁴⁵

¹⁴² Known only to the Constitution of the West German State of Hesse. Art. 22, § 2 of the Hessian Constitution of 12 - 18 - 1946. Ges. & V.O.B1. 229, as approved by the U.S. Military Government.

¹⁴³ State v. Prince, 52 N.M. 993, 995, 189 P.2d 993 (1948). The West Virginia case of State v. Sixo, *supra* n. 86, comes close to reaching the same standard as that of State v. Prince. Were it not for the fact that in the later decided A. & P. case the court conceded to the legislature the power to dispense with the *mens rea* requirement, State v. Sixo might have served as the basis for a later decision outlawing all absolute criminal liability as violative of due process. v. Elliot, 232 N.C. 377, 61 S.E.2d 93 (1950).

¹⁴⁴ Existing under German law since the West German Federal Supreme Court decision, by the Plenum of the Criminal Senate, of March 18, 1952. GSSt. 2/51. 2 BGH St. 194, 5 N.J.W. 593, 7 J.Z. 335 (1952). The North Carolina rule is similar. But there the *mens rea* is presumed for all regulatory offenses, until the defendant rebuts the presumption, which he is at liberty to do in all such prosecutions. E.g., State v. Welch, 232 N.C. 77, 59 S.E.2d 199 (1950); State v. Elliott, 232 N.C. 377, 61 S.E.2d 93 (1950).

¹⁴⁵ Art. 41 TEXAS PENAL CODE. Hamilton v. State, 115 Tex. Cr. 96, 29 S.W.2d 777 (1930); but note that statutes which require no more than a union of criminal act and criminal intent as to all crimes, and which were probably passed for the same purpose as the Texas statute, have been interpreted to require no more than an intent to do that which the law in fact prohibits, regardless of mistakes of fact. Mental self-direction and criminal intent are thus being confused. Balark v. State, 81 Ga. App. 649, 59 S.E.2d 524 (1950); People v. Gory, 28 Cal.2d 450, 170 P.2d 433 (1946).

(5) Case law to the effect that the necessity for *mens rea* will be presumed for all crimes, unless a legislative intention contrary is "clearly expressed" (*West Virginia Rule*).¹⁴⁶

(6) Case law to the effect that whether or not *mens rea* is required for regulatory offenses depends on statutory construction aimed at uncovering the legislative intention,—without any fixed criteria for ascertaining these standards. (The result of this rule, prevailing in most American jurisdictions, is a confused law, with inconsistent decisions, and the lowest possible state of legal certainty).¹⁴⁷

(7) Case law to the effect that the legislature has an absolute discretion to dispense with the *mens rea* requirement in all regulatory offenses, that such dispensation will be presumed, unless the contrary clearly appears.¹⁴⁸

(8) Case law to the effect that the legislature is presumed to have dispensed with the *mens rea* requirement in all statutory crimes (which may embrace the entire body of criminal law) whenever a statute is silent on *mens rea*, regardless of the nature of the crime, or the severity of punishment.¹⁴⁹

(9) A "law" which attempts to punish anybody who is harmful to the ruling power, for any act which the judges under a catch-all provision deem detrimental to the ruling power, whether the defendant meant to do the act or not, whether the act was known to be offensive or not.¹⁵⁰

Were we to draw a line that would separate the sound law from the unsound law, this line would lead through the middle of the fifth category, with the *West Virginia Rule* being in the upper half.

¹⁴⁶ E.g., *State v. Great Atlantic & Pacific Tea Co. of America*, 111 W. Va. 148, 161 S.E. 5 (1931). We could here further distinguish between: (A) states in which after such a ruling the legislature has clearly expressed a wish to abolish *mens rea*, e.g., England, at least theoretically. See WILLIAMS, CRIMINAL LAW § 70 (1953). (B) States in which the legislatures have not so acted. Thus far West Virginia seems to stand alone with its salutary rule.

¹⁴⁷ This is the typical way of stating the rule, and is in general use by writers and judges who make no attempt at analyzing the problem accurately. E.g., *People v. Daniels*, 18 Cal. App. 2d 340, 257 P.2d 1038 (1953); *Commonwealth v. Babb*, 166 Pa. Super. 63, 70 A.2d 660 (1950); *Commonwealth v. Fine*, 166 Pa. Super. 109, 70 A.2d 677 (1950); *United States v. Combs*, 73 F. Supp. 813 (E.D. Ky. 1947).

¹⁴⁸ *Halstead v. State*, 41 N.J.L. 552, 596, 32 Am. Rep. 247 (1879); but see *State v. Labato*, 7 N.J. 137, 80 A.2d 617, 623 (1951), limiting the *Halstead* case; *La Russa v. State*, 152 Fla. 504, 196 So. 302 (1940), two JJ. dissenting.

¹⁴⁹ *State v. Hennessy*, 141 Wash. 351, 195 Pac. 211 (1921), maximum penalty ten years penitentiary and/or \$5,000.00 fine; *State v. Winger*, 41 Wn.2d 229, 248 P.2d 555 (1952), maximum penalty twenty years penitentiary. That in both cases the facts seem to point to an evil intent of the offenders may be regarded as fortunate for the course of justice, but it does not alter the anomaly of the rule.

¹⁵⁰ Former § 2 of the German Penal Code, in force until the destruction of dictatorship, 1945. And see ROSENTHAL et al., *DIE JUSTIZ IN DER SOWJETISCHEN ZONE* 44-57 (1952), as to the law in the Soviet Zone of Germany.

The categories above five are clearly healthier laws, the categories below five are unsound laws, with absolute and dictatorial law as the lowest form to which law can be degraded. The name "law" for such a rule is hardly justified. The fourth category, as the law in the majority of American states, is of particular interest, deserving much further exploration. Its shape is not encouraging. But West Virginia law has emerged from the abyss of absolute criminal liability. There may be hope that other jurisdictions will follow suit.